

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS**

DANIEL G. PAYTON,

Petitioner,

: Case No. 2:23-cv-122

- vs -

District Judge Michael H. Watson
Magistrate Judge Michael R. Merz

TIM SHOOP, WARDEN, Chillicothe
Correctional Institution,

:

Respondent.

TRANSFER ORDER

This habeas corpus action, brought *pro se* by Petitioner Daniel G. Payton under 28 U.S.C. § 2254, is before the Court for initial review under Rule 4 of the Rules Governing Habeas Corpus Cases.

Petitioner seeks relief from his convictions for aggravated murder, kidnapping, and rape in the Common Pleas Court of Scioto County, Ohio, in that court's Case No. 04CR447 in October, 2005 and from his 2014 convictions for the same offenses in the Fayette County Common Pleas Court's Case No. CRI20040085 (Petition, ECF No. 1, PageID 1).

Petitioner's Habeas Corpus History

As required by Habeas Rule 2(d), Petitioner has filed his Petition on the form prescribe by those Rules. Question 14 on that form asks the Petitioner if he has "previously filed any type of

petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?” to which Payton answered “no.” (Petition, ECF No. 1, PageID 12). That answer is untrue. The records of this Court show the following:

In Case No. 1:19-cv-149, Payton sought habeas corpus relief in this Court from his February, 2004, conviction in the Scioto County Common Pleas Court in Case No. 03-CR-638 for rape. On recommendation of Magistrate Judge Karen Litkovitz, District Judge Susan Dlott dismissed the Petition as barred by the statute of limitations.

In Case No. 1:19-cv-00657, Payton sought relief from his October, 2005, conviction in Scioto County Common Pleas Case No. 04-CR-447 for aggravated murder and rape. On recommendation of Magistrate Judge Karen Litkovitz, District Judge Michael Barrett dismissed the Petition as barred by the statute of limitations.

In Case No. 2:19-cv-03391, Payton sought relief from his 2006 convictions for aggravated murder and rape in the Fayette County Common Pleas Court’s Case No. CRI20040085. On recommendation of Magistrate Judge Chelsey Vascura, District Judge Edmond Sargus dismissed the Petition as barred by the statute of limitations.

Under 28 U.S.C. § 2244(b), a habeas petitioner may not file a second or successive habeas corpus petition challenging the same conviction challenged in a prior petition without first obtaining the permission of the federal circuit court of appeals. Determining whether a petition is second or successive is, in the first instance, the responsibility of the District Court in which the case has been filed. *In re: Kenneth Smith*, 690 F.3d 809 (6th Cir. 2012); *In re Sheppard*, 2012 U.S. App. LEXIS 13709 (6th Cir. May 25, 2012). Once a District Court decides a petition is second or successive, it lacks jurisdiction over the case. *Burton v. Stewart*, 549 U.S. 147 (2007); *Franklin v. Jenkins*, 839 F.3d 465(6th Cir. 2016). The District Court’s responsibility at that point is to

transfer the case to the court of appeals for its determination of whether the case can proceed. *In re Sims*, 111 F.3d 45 (6th Cir. 1997).

Plainly the instant Petition is second or successive of the Petitions in Cases No. 1:19-cv-00657 or 2:19-cv-03391. Accordingly, it is hereby ORDERED that the Clerk transfer this case to the United States Court of Appeals for the Sixth Circuit for that court's decision on whether Payton may proceed.

January 11, 2023.

s/ *Michael R. Merz*
United States Magistrate Judge